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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC. APPLICATION No. 3894 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE K.J.VAIDYA

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1. Whether Reporters of Local Papers may be allowed to see the judgements ? YES

2. To be referred to the Reporter or not ? YES

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3. Whether Their Lordships wish to see the fair copy of the judgement? NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder ?NO

5. Whether it is to be circulated to the Civil Judge ? YES

STATE OF GUJARAT

Versus

PIRUBHAI JIVABHAI MISTRY

Appearance:

Mr. D.N Patel, learned APP for Petitioner
Mr. B.M Rawal, learned advocate for respondent-accused.

CORAM : MR.JUSTICE K.J.VAIDYA
Date of decision: 11/12/96

ORAL JUDGEMENT

"Whether and when the panch-witness having supported the prosecution case in his examinationin-chief and ultimately during the cross-examination started giving evidence prejudicial, rather destructive to the prosecution, then under the circumstances, learned trial Judge was justified in not permitting the learned PP to re-examine him and/or to put him leading question/s in the nature of cross-examination merely because moment and at the time the witness started deviating bidding good-bye to the prosecution case, adding or substracting from the original statement, the learned PP failed to object and make request to re-examine or cross-examine as the case may be ?? This in short, precisely is the question which this Court is called upon to answer, arising in the context and background of the facts-situation of the case narrated hereunder.

2. To state few relevant facts - Pirubhai Jivabhai Mistry with others came to be tried for the alleged offences punishable under Sections 307, 324, 147, 148, 149 and 294 of the Indian Penal Code read with Section 135 of the Bombay Police Act, 1951 by the learned Addl. Sessions Judge in Sessions Case No. 140 of 1992. During the course of trial, the prosecution examined several witnesses, one of them was PW-9 Nazarali Gulammiya Saiyed who appeared as a panch witness for scene of offence. It appears from the examination-in-chief that he supported the prosecution case but then during his course of cross-examination by the learned advocate appearing for the accused, he has shown the tendency of blowing hot and cold ie., to say giving an evidence in a manner prejudicial to the prosecution which ultimately favoured the accused. In this view of the matter, the learned PP appearing for the State immediately after the cross-examination was over, on the very same day, submitted an application Exh. 45 inter alia praying for re-examination of PW-9 in order to put the leading question in nature of cross-examination to him. This application Exh. 45 of the learned PP was summarily dismissed by the trial Court on 14-6-1996 on the very day on three grounds viz., Firstly, it was the duty of learned PP to immediately object to the legality and the admissibility of the question put by the learned defence counsel to PW-9 in the cross-examination which was not done, Secondly, after the completion of recording entire evidence including cross-examination, to ask for declaring a witness hostile was not only improper but the

same was waste of the precious time of the Court, and thirdly, the re-examination of a witness can be permitted only in those cases wherein in-between the examination-in-chief and cross-examination, there is some ambiguity which is required to be clarified. This was precisely not the case here. It is under these circumstances that the State has preferred this Criminal Revision Application challenging the impugned order passed by the learned Addl. Sessions Judge, praying for (i) quashing and setting aside the same, and (ii) permitting the learned Public Prosecutor re-examine PW-9 amd to put leading questions in nature of cross-examination to PW-9 or declare him hostile as the case may be.

3. Heard learned APP Mr. D.N Patel and Mr. B.N Raval, learned advocate for the respondent-accused.

4. At the very outset, it is required to be stated that the impugned order rejecting the application of the learned PP to permit him re-examine and put leading questions in nature of cross-examination to PW-9 on the ground stated in his judgment/order are ex-facie illegal, and hence the same deserves to be quashed and set-aside. Had the learned trial Judge been little discreet and careful enough to peruse relevant Sections 137 & 154 of the Evidence Act, the mistake which has unfortunately crept-in in his Order could have been easily avoided. The relevant section pertaining to examination-in-chief, cross-examination, re-examination and declaring witness hostile reads as under :-

Sec.137 : Examination-in-Chief

The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination - The examination of a witness by the adverse party shall be called his cross examination.

Re-examination - The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

"Sec.154 : Question by party to his own witness
The Court may, in its discretion permit the

person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."

5. When the prosecution witness in his examination in chief gives evidence quite consistent with the prosecution case, at that stage, obviously no question of re-examining or declaring him hostile arises. As against this, had indeed the witness taken convinent sommersault during the course of his examination-in-chief itself, then in that case it was obviously the duty of the learned PP to atonces request the Court to permit him to declare his witness hostile and put leading questions to him by confronting him with the panchnama and or for that purpose in case of other prosecution witnesses by confronting him with his previous statement. Now indisputably that is not the case here. Accordingly, during the course of cross-examination, if a witness becomes a turn-coat and answers the questions of learned advocate for the accused in a way which is prejudicial to the prosecution and favours the accused, then it can be said with certainty that he has started showing the tendency of hostility against the prosecution. In such cases, when the cross-examiantion is in progress, it would not be proper, rather the learned PP may also feel it not proper to dabble in the midst of the cross-examination to disturb learned advocate for the accused as moment the same was over, he would have turn to request the court to re-examine him and/or permit to put the leading question in nature of cross-examination, and accordingly, he may wait for sometime till the cross-examination is over. There is indeed nothing wrong in it. Rather this was the proper Court. Apart this, here in this case, it is clear that after the cross-examination was over, on the very same day, the learned PP has submitted an application for putting the leading questions to the PW-9 who had not supported the prosecution. In this regard, this court quite reasonably assumes that first of all an oral request must have been made by the learned PP to the learned trial Judge but then since that was not acceeded to, the learned PP not giving up his right to re-examine the evidence of PW-9 Nazarali Gulammiya Saiyed by putting the leading questions was ultimately constrained to submit an application Exh. 45 for the said purpose. When precisely such is the state of affairs, it is simply unthinkable that the learned trial Judge could dare pass such a fiat order rejecting the application of the learned PP. The learned trial Judge ought not to have been oblivious to the fact that in criminal cases, the

heavy burden lies on the prosecution to prove its case and that too to prove beyond doubt much less the reasonable doubt and that this onerous duty is ultimately to be discharged by the learned PP who is incharge of the case by carefully examining prosecution-witnesses re-examining and if need be by declaring him hostile to the prosecution before the Court ! If under such circumstances to have a fair trial to the State the learned PP made an application, for that purpose even an oral request it was the first hand duty of the learned trial Judge to immediately accede to it and permit him to re-examine and/or put leading questions to the PW-9 after the cross-examiantion was over. Further, what prejudice indeed it would have caused to the accused if the learned PP was permitted to put a leading question to the concerned panch-witness ?? In fact, not to permit re-examination and questions to be asked would be quite unjust and unfair to the State and amounts to denial of the fair trial to the prosecution. Fair trial does not necessarily mean fair to the accused and not to the State. Thus, the error committed by the learned trial Judge being ex-facie obvious and manifestly illegal, the same atones deserves to be corrected. While passing the interim order of nature like the one in the instant case, in the midst of trial, the trial Judge is required to be quite careful and circumspect enough so as not to deny fair trial to the prosecution as such orders when challenged, unnecessarily delays the trial to the greatest detriment and prejudice once again to the prosecution which with little care on the part of the learned trial Judge could have been easily avoided.

6. In view of the aforesaid discussions, this Court has indeed no alternative left but to quash and set-aside the impugned order passed by the learned trial Judge.

7. In the result, this criminal misc. application is allowed. The impugned judgment and order passed by the learned trial Judge is hereby quashed and set-aside. The learned trial Judge shall permit the learned PP to put the leading qeustions and if need be to declare PW-9 hostile. The trial shall proceed immediately within 10 days from the date of receipt of this Operative Order.

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Prakash*